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April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 20, 2004

Case No.: TIA-0207

XXXXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant appeals a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a process operator and chemical operator at the Oak Ridge Gaseous Diffusion Plant (the plant). She has worked at the plant intermittently, from 1975 to the present.

The Applicant filed a Subpart B application with DOL and a Subpart D application with DOE. In both applications, she claimed breast cancer with metastases to the lung, rib, and liver, and skin cancer. The DOL approved the Applicant's breast cancer claim and referred the skin cancer claim to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. See OWA Record at 1130. The OWA referred the Subpart D claim to the Physician Panel. The Physician Panel rendered a negative determination and the OWA accepted the determination.

The Applicant filed the instant appeal. In her appeal, the Applicant challenges the negative determination. She states that the Panel misstated the date of diagnosis of her breast cancer. She also states that, when the Panel referred to theories about

the risk factors for her type of skin cancer, the Panel mistakenly stated that she had diabetes.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant received a positive DOL Subpart B determination on her breast cancer claim. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). See also *Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination on that illness and further consideration of the Applicant's challenge to that determination is unnecessary.

The Applicant's contention that she does not have diabetes does not indicate any material error in the negative determination on skin cancer. The Panel stated that the cause of the type of skin cancer at issue - syringoma - is not known. The Panel stated that no studies had identified radiation as a risk factor, and the Panel discussed studies looking at other possible risk factors, including diabetes. Given the Panel's statement that the cause of syringoma is unknown and that no studies have identified radiation as a risk factor, the Panel's statement that the Applicant had a condition being studied as a risk factor was not material to the determination. Accordingly, the Applicant has not identified any material Panel error.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0207, be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 22, 2005